Delaware Quarterly

Recent Developments in Delaware Business and Securities Law

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The Delaware Supreme Court and Delaware Court of Chancery are generally regarded as the country's premier business courts, and their decisions carry significant influence over matters of corporate law throughout the country, both because of the courts' reputation for unsurpassed expertise in the field and because the vast majority of public companies in the United States are incorporated in Delaware and, thus, governed by its substantive law. Accordingly, Delaware's corporate jurisprudence provides critical guidance to corporations, alternative entities and practitioners in evaluating corporate governance issues and related matters.

Each calendar quarter, the Delaware Quarterly analyzes and summarizes key decisions of the Delaware courts on corporate and commercial issues, along with other significant developments in Delaware corporate law.

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Delaware Quarterly: October – December 2013

By Jonathan W. Miller, John E. Schreiber, Matthew L. DiRisio, Jill K. Freedman, Ian C. Eisner, Paul Whitworth, George W. Mustes, Zachary L. Sorman and Saher Shakir

Two decisions from the Delaware Supreme Court may prove to be the most significant of the Delaware rulings this past quarter – *Winshall v. Viacom International Inc.*[1] and *Activision Blizzard, Inc. v. Hayes*.[2] In *Winshall*, the high court affirmed two Chancery Court decisions on narrow interpretations of a merger agreement's earn-out and indemnification provisions, making clear that Delaware courts will not infer protections that easily could have been, but were not, expressly contracted for. As to the former, the Court affirmed the dismissal of the claim of former stockholders of an acquired company that the buyer's failure to maximize future contingent earn-out payments violated the implied covenant of good faith and fair dealing, finding that the implied covenant of good faith and fair dealing did not impose a duty on the buyer to subvert its own interest to maximize contingent earn-out payments. As to the latter, the Court affirmed the grant of summary judgment against the buyer's indemnification claim because the merger agreement required an actual breach of representation and warranties by the sellers for indemnification, and the parties could have, but failed to, include independent "duty to defend" or "advancement" provisions.

In *Activision*, the high court reversed a decision by the Court of Chancery enjoining Activision Blizzard, Inc. from consummating a $5.83 billion stock buyback transaction with its controlling stockholder, Vivendi, S.A. Rejecting the lower court's finding that a proposed deal constituted a "merger, business combination or similar transaction" under Activision's charter, thereby requiring stockholder approval to effectuate the transaction, the Supreme Court found that the transaction was more properly characterized as a separation, rather than a combination, of the two companies because it did not involve any intermingling of the companies and the net result of the transaction was to divest Vivendi of its controlling interest in Activision. The Court emphasized that the focus should be on substance over form in determining the nature of business transactions.

Each of these matters is discussed in greater detail below, followed by synopses of the quarter's other Delaware decisions across a range of topics, including: alternative entities; anti-suit injunctions; appeals; appraisals; attorney's fees; books and records actions; constitutional law; contract interpretation; corporate governance issues; derivative actions; fiduciary duties; injunctions; jurisdiction; laches; motions to dismiss; motions to reconsider; motions to stay; settlements; written consents; and other matters of Delaware practice and procedure.

1. *Winshall v. Viacom Int'l., Inc.*, 76 A.3d 808 (Del. 2013).
2. *Activision Blizzard, Inc,. et al. v. Hayes*, C.A. No. 8885-VCL, 2013 WL 6053804 (Del. Nov. 15, 2013).

Winshall v. Viacom International Inc.[3]

The *Winshall* decision addresses two often-important aspects of M&A litigation: earn-out provisions, which regularly serve to bridge gaps in price negotiations by entitling the selling party to contingent future payments if the acquired entity reaches certain performance thresholds going forward; and indemnification provisions, which aim to allocate liability amongst deal participants for certain types of post-closing losses related to the acquired entity. Specifically, the Delaware Supreme Court affirmed two Court of Chancery decisions that: (i) dismissed a claim by former stockholders of an acquired company that the buyer's failure to maximize future contingent earn-out payments violated the implied covenant of good faith and fair dealing; and (ii) ruled on summary judgment that the same buyer was not entitled to reimbursement for defense costs associated with several post-closing intellectual property claims because, in pertinent part, the governing merger agreement (a) required an *actual* breach of representations and warranties by the selling stockholders to trigger the acquiror's indemnification rights and (b) did not include independent "duty to defend" or "advancement" provisions. Through its strict interpretation of the parties' earn-out and indemnification rights, *Winshall* reiterates Delaware courts' respect for contractual freedom and corresponding reticence to infer protections that could easily have been, but were not, expressly contracted for.

Background

The Viacom-Harmonix Merger

In October 2006, Viacom International Inc. ("Viacom") acquired Harmonix Music Systems, Inc. ("Harmonix"), a developer of music-based video games including the popular *Guitar Hero* and *Rock Band* series. The merger agreement (the "Merger Agreement") provided that Harmonix's former stockholders (the "Selling Stockholders") would receive (i) $175 million in cash at closing and (ii) the contingent right

3. *Winshall*, 76 A.3d 808.

to receive future incremental earn-out payments should Harmonix achieve certain profitability thresholds in 2007 and 2008.

The Merger Agreement also provided that the Selling Stockholders would indemnify Viacom against losses arising from any breach of representations and warranties made by the Selling Stockholders, including that, as of the date of closing, Harmonix was not in violation of any third-party's intellectual property rights and had disclosed all outstanding intellectual property claims against it to Viacom. To exercise its indemnification rights, Viacom was required, among other things, to notify the Selling Stockholders of any indemnifiable losses by April 27, 2008. To ensure the future availability of funds for such claims, the parties separately entered into an escrow agreement (the "Escrow Agreement") providing that $12 million of the $175 million paid at closing would be held in escrow until the end of the indemnification notice period. Losses over and above $12 million, could, under the Merger Agreement, be withheld by Viacom out of future earn-out payments otherwise payable to the Selling Stockholders.

The Rock Band Distribution Agreement(s)

In March 2007, roughly six months after the merger closed, Harmonix entered into a three-year agreement with Electronic Arts, Inc. ("EA"), under which EA would distribute the *Rock Band* game (which was in development during the merger negotiations but not released until November 2007) in exchange for distribution fees from Harmonix (the "Original Agreement"). But in October 2008, nearly a year after the game's highly successful debut, Harmonix and EA recut the Original Agreement to cover the distribution of sequels to *Rock Band* sequels (the "Amended Agreement").[4] In the course of negotiating the Amended Agreement, Harmonix rejected a proposal by EA that would have reduced the distribution fees payable by Harmonix in 2008, opting instead for other concessions, *i.e.*, reduced distribution fees starting in 2009, coupled with EA's commitment to purchase advertising from Viacom. Notably, none of the concessions secured by Harmonix in the Amended Agreement impacted the amount of the 2008 earn-outs ultimately paid to the Selling Stockholders, which would have been the same had the Original Agreement remained in effect.

The Indemnification Dispute

Meanwhile, *Rock Band*'s (post-closing) release spawned four post-closing infringement lawsuits in 2007-2008 by companies alleging that the game violated their intellectual property rights. On April 24, 2008, three days before the Merger Agreement deadline, Viacom notified the Selling Stockholders of three such suits and indicated that it might seek indemnification on the ground that the Selling Stockholders had violated representations and warranties in the Merger Agreement regarding exposure to intellectual property liability. On July 21, 2008 – nearly three months *after* the notice deadline – Viacom sent a similar notice of a fourth infringement claim. All four cases were ultimately dismissed or settled.

Hearing nothing further from Viacom on the notices, the Selling Stockholders eventually requested the release of the $12 million escrow balance in September 2008 – four months after the eighteen-month escrow period elapsed. Viacom refused, arguing that the Selling Stockholders were required under the Merger Agreement to reimburse it for the $28 million in defense costs arising from the four intellectual property suits.[5] The Selling Stockholders responded by filing suit against Viacom and Harmonix in the Court of Chancery: (i) asserting that Harmonix and Viacom breached the implied covenant of good faith and fair dealing by failing to exploit the opportunity to negotiate lower 2008 distribution fees with EA (and thus failing to increase the amount of 2008 earn-out payments) (Count I); and (ii) seeking an order declaring that defendants were not entitled to indemnification and releasing the escrowed funds (Counts II and III).

The Court of Chancery Opinions

By decisions dated November 10, 2011[6] and December 12, 2012,[7] respectively, the Court of Chancery granted (i) defendants' motion to dismiss Count I and (ii) summary judgment to the Selling Stockholders on Counts II and III.

The November 10, 2011 Dismissal

After a lengthy footnote confirming that the Delaware standard on a motion to dismiss is whether a plaintiff has alleged any "reasonably conceivable" set of facts under which he or she would be entitled to relief (as opposed to the federal

4. *Winshall v. Viacom Int'l. Inc.*, 55 A.3d 629, 633-34 (Del. Ch. 2011) ("*Winshall I*"); *Winshall*, 76 A.3d at 811-12.

5. *Winshall*, 76 A.3d at 812.; *Winshall v. Viacom Int'l. Inc.*, C.A. No. 6074-CS, 2012 WL 6200271, at *3-4 (Del. Ch. Dec. 12, 2012). ("*Winshall II*").

6. *Winshall I*, 55 A.3d at 642.

7. *Winshall II*, 2012 WL 6200271 at *9.

"plausibility" test),[8] the court nevertheless dismissed the Selling Stockholders' good faith and fair dealing claim as deficient even under that minimal threshold. As an initial matter, the court observed that the implied covenant cannot be used to manufacture contractual protections that parties "failed to secure for themselves at the bargaining table."[9] Instead, a party seeking to establish an implied obligation must show that the obligation was within the parties' reasonable expectation at the time of contracting. As to the Selling Stockholders' position – that, presented with the opportunity to do so, defendants had an implied duty to negotiate the Amended Agreement with EA in a manner that would maximize the contingent earn-out payments – the court found it wanting for several reasons.

First, the court emphasized that while defendants declined to structure the Amended Agreement in a manner that maximized the 2008 earn-out payments, they also did nothing to *reduce* those payments. Thus, in contrast to a scenario where a buyer deliberately minimizes earn-out payments – e.g., by purposefully moving revenue out of the earn-out period or incurring extra costs within it – the 2008 earn-outs paid to the Selling Stockholders were in fact calculated exactly as prescribed in the Merger Agreement (and the same as they would have been under the Original Agreement). Second, the court noted that the contingent earn-out payments were uncapped, such that no reasonable buyer would agree (and no reasonable seller could expect it) to maximize limitless payments at all costs. Third, the court found that the Selling Stockholders had no expectancy interest in the products affected by the Amended Agreement – *e.g., Rock Band* sequels – which did not exist at the time of the merger and would not be released during the earn-out period.[10]

The December 12, 2012 Summary Judgment Ruling

Roughly a year later, the court ruled on summary judgment that Viacom was not entitled to indemnification from the Selling Stockholders for costs associated with the *Rock Band* intellectual property suits.[11] To begin with, the plain text of the Merger Agreement limited the Selling Stockholders' duty to fund Viacom's defense costs against third-party claims to losses they were required to indemnify, and did not impose a separate and independent "duty to defend." The indemnification obligation, in turn, applied only to losses arising from an *actual* breach by the Selling Stockholders of representations and warranties in the Merger Agreement. Here, the court was not persuaded that the infringement suits constituted a breach, because, inter alia, the representations and warranties regarding Harmonix' intellectual property were made *as of* the closing of the merger in October 2006, while the infringement claims centered around post-closing intellectual property, *i.e.*, the final *Rock Band* product, which was still in development at closing and not released until over a year. Accordingly, the court thus found that the representations and warranties did not reach the alleged post-closing conduct.[12]

The Selling Stockholders appealed the dismissal of Count I, and defendants cross-appealed the summary judgment ruling for the Selling Stockholders on Counts II and III.

The Supreme Court's Analysis

The Implied Covenant of Good Faith and Fair Dealing Ruling

As an initial matter, the Court responded to Chancellor Strine's extensive footnote analysis of Delaware's "reasonable conceivability" 12(b)(6) pleading standard with one of its own,[13] arriving at a slightly different conclusion. In particular, the Court explained that the Delaware standard is in fact less rigorous than the federal "plausibility" standard since, per its decision in *Central Mortgage*, "conceivable" is akin to "possible," whereas "plausible" falls somewhere on the continuum between "possible" and "probable."[14] In any event, while the Court left the door open to adopting the federal plausibility rule in Delaware in an appropriate case in the future case, it made clear that "reasonable conceivability" remains the law of the land.

Against that backdrop, the Supreme Court agreed with the

8. *Winshall II*, 55 A.3d at 635 n.23 (discussing, *inter alia, Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011)). The Chancellor found "reasonable conceivability" and "plausibility" to be akin, noting that there is little (if any) difference between the federal standard and Delaware's. And, to the extent *Central Mortg*. permits conclusory allegations unsupported by pled facts to state a claim, the Chancellor deemed it inconsistent with established Delaware precedent.
9. *Id.* at 637 (quoting *Aspen Advisors LLC v. United Artists Theatre Co.*, 861 A.2d 1251, 1260 (Del. 2004)).
10. *Id.* at 640-41.
11. 2012 WL 6200271 at *9.
12. *Id.* at *7. Alternatively, the court found that even if a triable issue of fact had been established, the fourth infringement claim – of which Viacom failed to notify the Selling Stockholders within the period prescribed by the Merger Agreement – would be rejected under the limitations period. In that regard, the court found that Viacom's issuance within the period of a general, catch-all reservation of rights to later seek indemnification for other yet-unnamed claims could not be used to toll the time limitation.
13. *Winshall*, 76 A.3d at 813 n.12.
14. *Id.* (citing Central Mortg., 27 A.3d at 537 n.13).

Court of Chancery that the Selling Stockholders had failed to state a valid claim for breach of the implied covenant of good faith and fair dealing. As the Court explained, the Selling Stockholders were arguing that, because defendants were presented with an opportunity to increase potential earn-out payments, they were necessarily obligated under the implied covenant to seize on that opportunity. The Court rejected that argument as a matter of law. Citing extensively to the Chancellor's opinion, the Court reasoned that the implied covenant is limited to situations where the parties would have agreed to the right or protection sought to be imposed had they openly negotiated it. In other words, for the Selling Stockholders' implied covenant claim to prevail:

[I]t must be clear from the Merger Agreement that Viacom and Harmonix would have agreed to take whatever steps were available and required to maximize the amount of the earn-out.[15]

The Court found no support for that interpretation in the Merger Agreement. Noting that the parties could have certainly have included such an obligation had they seen fit, the Court concluded that "[n]othing in the Merger Agreement states, or could be read to imply, that Viacom or Harmonix must conduct their businesses, post-merger, so as to maximize the amount of the Selling Stockholder' earn-out payments."[16]

In addition, the Court – like the Court of Chancery below – found it significant to the good faith and fair dealing analysis that the defendants took no affirmative steps to *reduce* the earn-outs in negotiating the Amended Agreement. On the contrary, because none of amendments affected the amount of the 2008 earn-outs (which would have been identical had the Original Agreement been in effect), the new contract in effect preserved the *status quo*. In that regard, the Court referred to Chancellor Strine's distinction between the facts here and a scenario in which defendants purposefully operated their business in a manner designed to drive earn-outs down, which would be a very different analysis.[17]

As to specific claims of error advanced on appeal, the Selling Stockholders argued that the Court of Chancery: (i) erred in relying on the Original Agreement in analyzing the motion to dismiss because it was first submitted with defendants' reply brief; (ii) failed to recognize that EA would need a new agreement in 2008 in order to distribute *Rock Band 2*, such that the court's inference that EA had distribution rights with respect to products released throughout the earn-out period was erroneous; and (iii) failed to recognize that EA's distribution rights under the Original Agreement were uncertain based on certain open terms, such that Harmonix had considerable leverage and could extract additional concessions from EA. The Court promptly disposed of each argument.

First, the Court held that the Original Agreement was both integral to and incorporated by reference in the amended complaint: the Selling Stockholders' core claim turned on the allegation that the amendment of that very agreement constituted a breach of the implied covenant, and the amended complaint explicitly referred to the Original Agreement "at least nine" times.[18] Second, the Court found that the Court of Chancery's factual inference regarding EA's distribution rights in 2008 irrelevant to the court's legal conclusion that "the Selling Stockholders had no reasonable expectancy interest" with respect to "products released after the expiration of the earn-out period."[19] Third, the Court found the Selling Stockholders' argument pertaining to the uncertainty of EA's distribution rights both confusing and irrelevant, since, even if Harmonix failed to exploit negotiating leverage from EA, that would not constitute a breach of the implied covenant.

The Indemnification Ruling

The Supreme Court also affirmed the Chancellor's decision, on summary judgment, that Viacom was not entitled to indemnification from the Selling Stockholders, thereby requiring the release of the escrow funds. As a threshold matter, the Court agreed that the Merger Agreement only requires the Selling Stockholders to pay Viacom's defense costs if the underlying claim implicates an actual breach of representations and warranties by the Selling Stockholders. Viacom argued that the Merger Agreement includes a duty to defend (and fund defense costs) independent from and broader than its indemnification obligation – *i.e.*, if it provided notice of a third-party claim against it, then the Selling Stockholders were required to pay Viacom's defense costs, even if Viacom was not actually entitled to indemnification. The Court rejected this claim because: (i) the plain language of the Merger Agreement expressly conditioned the duty to pay defense costs associated with third-party claims on a predicate duty to indemnify, which, in turn, requires an actual breach of representations and warranties; (ii) under Delaware law, a standalone duty to *indemnify* provision does not give rise a separate duty to *defend* or *advance* defense costs, which must be separately negotiated and incorporated in the underlying contract; and (iii) defendants' interpretation of the

15. *Id.* at 816.
16. *Id.*
17. *Id.* at 816-17.
18. *Id.* at 818.
19. *Id.*

Merger Agreement was illogical, as it would presumably require the Selling Stockholders to defend against any and all claims – regardless of merit – based solely on notice from defendants.[20]

The Supreme Court next confirmed the Court of Chancery's holding that Viacom failed to create a triable issue of fact regarding the Selling Stockholders' breach of a representation or warranty. First, and most simply, Viacom never presented evidence or even alleged that *Rock Band* infringed a third-party's intellectual property rights. Second, the Court found no evidence in the Merger Agreement that the Selling Stockholders had intended to make representations and warranties about *Rock Band*, a game that was unfinished at the time of the merger. Indeed, it was Viacom itself that finished developing the game and shopped it to distributors. Finally, Viacom failed to offer evidence that Harmonix had even been utilizing the intellectual property at issue in the four lawsuits when, prior to the merger, it was developing *Rock Band*.[21]

Finally, the Court took advantage of its review of defendants' cross-appeal to address a "potential misimpression" regarding the standard for cross-appeals.[22] In *Gerber v. Enterprise Products Holdings, LLC*,[23] the Court arguably held that an appellee who seeks to argue that a lower court's judgment was correct, but that its reasoning was flawed, must file a cross-appeal. The Court clarified that this is inaccurate; under Delaware law, an appellee may support a judgment with any evidence supported by the record, even if that evidence calls into question the lower court's ruling.

Takeaways

First, the holding makes clear that the implied covenant of good faith and fair dealing will not impose a duty on acquirors to subvert their own interests in order to maximize contingent earn-out payments – a right sellers could clearly negotiate and contract for – absent some express indication in the underlying agreement that the parties intended such an obligation. At the same time, the Supreme Court (and the Court of Chancery) focused heavily on the fact that Harmonix did not engage in some egregious manipulation of the earn-out payments downward; the earn-outs were, in fact, calculated and paid exactly as promised in the governing merger agreement (and entirely in line with the sellers' expectations). A more difficult question would arise where an acquiror's otherwise justifiable business conduct has the effect (but not the purpose) of depressing earn-out totals, while complying with the letter of the governing earn-out provisions. In other words, the metes and bounds of an acquiror's duty to exercise contractual discretion "reasonably and in good faith" remains to be seen. Given that uncertainty (and the inherent potential for mischief in the earn-out space), deal participants and practitioners should consider addressing in the acquisition agreement itself the parties' expectations for the operation of the target company vis-à-vis earn-outs (*e.g.*, any governance measures or business restrictions) throughout the earn-out period.

Second, the decision highlights the importance of precise drafting in the indemnification context. As a general rule, Delaware courts construe indemnification provisions strictly and will not lightly infer obligations not readily apparent from the governing contract. Most notable from the *Winshall* decision is the critical distinctions under Delaware law between (i) an obligation to "indemnify" or "indemnify and hold harmless," on the one hand, and (ii) an obligation to "defend" or "advance" defense costs on the other. In short, a standalone right to indemnification will not be read by Delaware courts to imply a corresponding right to defense costs (or advancement of those costs). Similarly, where – as is typical in the M&A context – a seller's indemnification obligation is conditioned on an *actual* breach of representations or warranties, a buyer will face an uphill battle in seeking reimbursement (or advancement) of costs related to third-party claims without establishing a related violation of a representation or warranty by the seller. Accordingly, a buyer that wants or expects a seller to indemnify it and/or advance defense costs for a broad range of claims must expressly delineate that right in the agreement.

Third, the case reiterates the temporal (and often transient) nature of contractual representations and warranties liability. In particular, where, as here, the representations and warranties are effective only as of the signing of the Merger Agreement – *i.e.*, there is no "bring down" provision carrying them forward – it becomes very difficult to establish a breach based on subsequent, post-closing activity.

Activision Blizzard, Inc., et al. v. Hayes[24]

In *Activision*, the Delaware Supreme Court, sitting en banc on an expedited appeal, unanimously reversed a decision by

20. *Id.* at 821.
21. *Id.* at 824-25.
22. *Id.* at 815 n.13.
23. 67 A.3d 400, 424 (Del. 2013).
24. *Activision Blizzard, Inc., et al. v. Hayes*, No. 497, 2013, 2013 WL 6053804 (Del. Nov. 15, 2013).

the Court of Chancery that had preliminarily enjoined Activision Blizzard, Inc. ("Activision") from consummating a $5.83 billion stock buyback transaction with its controlling stockholder, Vivendi, S.A. ("Vivendi"). In enjoining the transaction in September, Vice Chancellor Laster had held that the proposed deal, under which Vivendi would divest itself of its controlling interest in Activision, constituted a "merger, business combination or similar transaction" under Activision's charter, thereby requiring stockholder approval.[25] Faulting the trial court for "glorifying form over substance," the Supreme Court reversed, concluding that the proposed transaction was, in fact, "the opposite of a business combination" because it did "not involve any combination or intermingling of Vivendi's and Activision's businesses."[26] On the contrary, the Supreme Court observed, the net result of the transaction was that Vivendi's interest in Activision would be decreased from approximately 61% to 12% and Vivendi would relinquish its right to appoint directors to Activision's board.[27] Thus, the Court concluded, the transaction was better characterized as a separation, rather than a combination, of the two companies, which did not require approval of Activision's stockholders.[28] As discussed below, although the Supreme Court's decision in *Activision* is brief (only 12 pages), and to a significant degree fact-specific, it nevertheless provides important guidance for both practitioners and the lower courts going forward.

Background

In 2007, Activision, a global developer, publisher and distributor of video games, including the popular *Call of Duty* franchise, entered into a Business Combination Agreement ("BCA") with Vivendi, a French digital entertainment company. As a result of the 2007 BCA, Vivendi acquired a 61% interest in Activision.[29]

The present dispute arose out of Vivendi's subsequent decision in 2012 to sell its holdings in Activision. In July 2013, after Vivendi failed to find an outside buyer, the two companies entered into a Stock Purchase Agreement ("SPA") under which Activision agreed to pay Vivendi $5.83 billion for 429 million shares of Activision stock and $675 million in net operating loss carryforwards ("NOLs").[30] This aspect of the transaction was to be effectuated through Activision's acquisition of a newly-created, wholly-owned subsidiary of Vivendi – named New VH, but referred to as "Amber" – whose sole purpose was to hold the Activision shares and NOLs.[31] As part of the SPA, Vivendi also agreed to sell 172 million Activision shares to ASAC II, LP ("ASAC"), a limited partnership owned by two of Activision's directors.[32] Upon consummation of the transactions contemplated by the SPA, Vivendi would be left with 11.9% of Activision's stock, ASAC with 24.7%, and the remaining 63.4% would be publicly held.[33]

The transaction was announced on July 25, 2013 and was generally met with a positive response from both market analysts and investors, including a 15% increase in the price of Activision's common stock on the day following the announcement.[34] Nevertheless, several Activision stockholders, including Douglas Hayes, filed lawsuits challenging the proposed transaction on the grounds, *inter alia*, that Activision's charter requires a stockholder vote to approve the deal and that Activision's directors breached their fiduciary duties by entering into the SPA. Along with his complaint, filed on September 11, 2013, Hayes filed a motion for a temporary restraining order ("TRO") seeking to block consummation of the deal.[35]

The Court of Chancery's Decision

On September 18, 2013, a mere seven days after the plaintiff's TRO motion was filed – and only one day before the Activision/Vivendi transaction was set to close – the Court of Chancery held a hearing on the motion. The central issue before the trial court was whether the proposed stock purchase qualified under Section 9.1(b) of Activision's charter as a "merger, business combination or similar transaction" between the two entities.[36] Section 9.1(b) requires "the affirmative vote of a majority in interest of the stockholders" of Activision, other than Vivendi, with respect to such transactions.[37]

Ruling from the bench, Vice Chancellor Laster held that Activision's proposed stock repurchase from Vivendi constitutes a "merger, business combination or similar transaction" within the meaning of Activision's charter and, accordingly

25. *Id.* at *3.
26. *Id.* at *4.
27. *Id.*
28. *Id.*
29. *Id.* at *1.
30. *Id.*
31. *Id.*
32. *Id.* at *2.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at *3.
37. *Id.*

– having *sua sponte* converted the TRO motion into one for a preliminary injunction[38] – entered a preliminary injunction halting consummation of the transaction unless and until Activision's stockholders vote to approve it.[39]

The trial court's ruling was based on several key determinations. First, relying on *Martin Marietta Materials, Inc. v. Vulcan Materials Co*.,[40] the Vice Chancellor concluded that the term "business combination" was "fundamentally ambiguous" and should be interpreted "expansively."[41] Second, looking for guidance to the definition of "business combinations" under Section 203 of the Delaware General Corporation Law ("DGCL") (relating to "business combinations with interested stockholders"), the trial court concluded that Activision's acquisition of Amber – the means by which the transaction with Vivendi was to be accomplished – could "easily qualify as a business combination" under that standard.[42] Third, and perhaps most importantly, the Vice Chancellor concluded that the voting requirement in Section 9.1(b) of Activision's charter was intended to give the company's minority stockholders "a vote on transactions with a controller that could have not just control implications but value-transfer implications,"[43] explaining that:

> This is an $8 billion reorg. of Activision. Value is moving. Value is moving to the former controller. Value is moving to management. And a core part of the transaction is the corporation, Activision's, acquisition of a controlled subsidiary of Vivendi [Amber]. This is the type of thing that I think falls squarely within Section 9.1.[44]

The Supreme Court's Analysis

In an order entered on October 10, 2013, the Delaware Supreme Court, sitting *en banc*, unanimously vacated the Court of Chancery's injunction, finding that the proposed stock repurchase was not a "business combination" within the meaning of Activision's charter and that, therefore, a stockholder vote was not required. A 12-page written opinion authored by Justice Berger followed on November 15, 2013.[45]

Activision advanced three arguments on appeal: (i) that the Court of Chancery erred in converting the TRO motion into one for a preliminary injunction without notice; (ii) that the plaintiff's delay in seeking the TRO until eight days prior to the scheduled consummation of the transaction constituted laches; and (iii) that the trial court erred on the merits because the charter provision requiring a stockholder vote did not apply to the proposed stock purchase.[46] Because the Supreme Court addressed the merits of Activision's appeal, it did not reach the first two issues.[47]

In holding that the stock purchase was in fact "the opposite of a business combination," the Supreme Court focused on the fundamental nature and substance of the transaction.[48] It observed that, under the SPA: (i) Vivendi would divest itself of a total of 601 million shares of Activision stock (selling 429 million shares back to Activision and another 172 million to ASAC); (ii) control of Activision would shift from Vivendi to Activision's stockholders; (iii) Vivendi's holdings would decrease from 61% to 12%; and (iv) Vivendi's representation on Activision's board would decrease from six appointees to none. In other words, the "[t]wo companies will be separating their business connection" and Vivendi would be left as a minority stockholder without voting or board control over Activision.[49]

The Supreme Court further concluded that "[n]either the form of the transaction nor its size changes its fundamental nature."[50] Although, technically, Activision would combine with Amber, the newly-created Vivendi subsidiary that was to be the vehicle for the transaction, the Court observed that Amber "has never and will never conduct any business. It is a shell company created by Vivendi and its sole function is to serve as a vehicle for the transfer of valuable NOLs together with the Activision stock. Calling Amber a business for purposes of Section 9.1(b) disregards its inert status and glorifies form over substance."[51]

The Supreme Court also rejected the conclusion, adopted by the Chancery Court, that Section 9.1(b) of Activision's charter was intended to protect stockholders from so-called "value-moving" transactions involving large transfers of funds or other assets. According to the Court, nothing in the language of the charter provision supports this reading; rather, according to Justice Berger's opinion, the phrase "business combination or similar transaction" was meant to apply only to transactions that would "result[] in Vivendi having a greater

38. *Id.* at 2-3.
39. *Id.*
40. 56 A.3d 1072 (Del. Ch. 2012).
41. *Activision*, 2013 WL 6053804 at *3.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Activision*, 2013 WL 6053804.
46. *Id.* at *2.
47. *Id.*
48. *Id.* at *4.
49. *Id.*
50. *Id.*
51. *Id.*

connection with and/or control over Activision's business."[52] This latter interpretation, the Court concluded, was further supported by a complementary provision of Activision's bylaws that already addressed such "value-moving" transactions by requiring director-level (but not stockholder) approval for "*any* related-party transaction, regardless of its form or magnitude."[53] Thus, the Supreme Court reasoned, Activision's charter and bylaws, read together, provide complementary protections and confirm that Section 9.1(b) of the charter was intended to apply only to transactions that increased Vivendi's interest in Activision.[54]

Once the injunction was lifted, Activision completed the stock purchase the following day.[55]

Takeaways

First, the Supreme Court's decision makes clear that it will – and the lower courts should – focus on substance over form in considering and determining the nature and character of business transactions. Although the SPA between Activision and Vivendi expressly contemplated that Activision would acquire a Vivendi subsidiary, the Supreme Court nevertheless concluded that the transaction did not constitute a "merger, business combination or similar transaction" because the newly-created Vivendi subsidiary in question was an inert entity that "has never and will never conduct any business" and merely served as the vehicle by which the transaction was to be effectuated.[56] The net effect of the transactions contemplated by the SPA, the Court stressed, was that control of Activision would shift from Vivendi to Activision's stockholders and Vivendi would be left as a minority stockholder without voting or board control over Activision.[57] Under these circumstances, the court stated, it "glorifies form over substance" to conclude, as the Chancery Court did, that the proposed transaction constitutes a "business combination" or like transaction.[58] The decision should provide some comfort to transactional lawyers going forward that Delaware courts will take a common sense, big picture approach, rather than a hyper-technical one, in interpreting stockholder protections in charters and bylaws.

52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at *2 n.3.
56. *Id.* at *4.
57. *Id.*
58. *Id.*

Second, the decision reinforces that charter and bylaw provisions should be read together, in context and with the assumption that they were intended to be complementary. In *Activision*, the Supreme Court treated Activision's charter and bylaws as complementary documents, in part because both were amended together as part of the parties' initial business combination.[59] The fact that Activision's bylaws offered broad director-level protections over "any transaction" confirmed for the Court that the charter's narrower provision was intended to give additional protection at the stockholder level "only for transactions that increase Vivendi's interest in Activision."[60]

Finally, the case serves to illustrate the efficiency and highly-functioning nature of the Delaware courts in addressing high-stakes, expedited commercial litigation. In *Activision*, plaintiff's TRO/preliminary injunction motion was filed on September 11 and heard and decided by the Court of Chancery one week later on September 18, one day before the Activision/Vivendi transaction was scheduled to close.[61] Activision's expedited appeal was then heard and decided by the Supreme Court a mere 22 days after that on October 10, five days before the deal's financing deadline was due to expire.[62] In other words, from the filing of the complaint and TRO motion on September 11 to the final decision on appeal by the Supreme Court on October 10, 2013, the entire process took just 30 days.[63] Particularly in the era of government budget cuts, few, if any, other state court systems consistently function at such a high level.

Additional Developments In Delaware Business And Securities Law

Beyond those topics addressed above, the Delaware courts also issued noteworthy decisions in the following areas of law during the past quarter.

Alternative Entities

- In *AM General Holdings LLC, v. The Renco Group, Inc., et al.*,[64] Vice Chancellor Noble, in a memorandum opinion, denied AM General Holdings LLC's ("Holdco") motion for partial summary judgment on its breach of contract claim and granted defendants' motion

59. *Id.* at *1, *4.
60. *Id.* at *4.
61. *Id.* at *2.
62. *Id.*
63. *Id.*
64. C.A. No. 7639-VCN, 2013 WL 5863010 (Del. Ch. Oct. 31, 2013).

to dismiss Holdco's claims for: (i) indemnification; (ii) breach of fiduciary duty; (iii) aiding and abetting breach of fiduciary duty; (iv) tortious inference; (v) unjust enrichment; and (vi) conversion. The derivative action was brought by Holdco against nominal defendant Ishar Capital LLC ("Ishar") and the Renco defendants in connection with defendants' alleged breach of the Ishar limited liability company agreement. The court first addressed Holdco's breach of contract claim that defendants had breached the "prohibited investments" provision in the LLC agreement and found that while the clause was unambiguous, Holdco did not offer sufficient evidence to prove a breach. The court then turned to Holdco's claim that defendants breached fiduciary duties and/or aided and abetted those breaches in causing Ishar to make a prohibited investment and found that these allegations arose out of the same facts underlying contractual obligations, so the proper claim was one for breach of contract. Any related fiduciary duty claims were superfluous. The court also dismissed Holdco's tortious interference claim based on the "affiliate exception" – because defendants were not strangers to the agreement at issue. Finally, the court dismissed the indemnification claim involving an unrelated pending action in New York as not ripe.

- In *Barton v. Club Ventures Investments LLC*, [65] Vice Chancellor Noble, in a letter opinion, denied plaintiff David Barton's motion for partial summary judgment, finding that the LLC Agreement between Barton and Club Ventures Investments ("CVI") did not supersede the parties' non-compete agreement and that CVI retained the non-compete agreement after bankruptcy. Barton, creator of DavidBartonGym, wished to start a new, distinct club but claimed that prospective investors had been concerned that he may be subject to a covenant restricting his future employment. Barton initiated the instant action to remove this "cloud of uncertainty" and sought a declaratory judgment (i) that he is not subject to any non-compete agreement with CVI or (ii) if he were subject to such a non-compete agreement, that the terms of any such agreement violated public policy and were unenforceable. The court found that the LLC agreement, which did not contain a non-compete clause, did not supersede the earlier non-compete agreement, because the unambiguous integration clause in the LLC agreement provided that the LLC agreement only superseded agreements among defined members of the LLC – which CVI was not. The court also found that CVI assumed and retained the non-compete agreement under the unambiguous terms of CVI's bankruptcy plan. The plan provided that CVI assumed and was revested with all executor contracts not expressly rejected in the disclosure statement, and the non-compete agreement was not expressly rejected in the statement.

- In *Graven v. Lucero, et al.*,[66] Vice Chancellor Noble, in a letter opinion, denied plaintiff's motion for summary judgment in a proceeding brought by plaintiff to determine the rightful controller of a Delaware limited liability company. Plaintiff, a founding principal of the LLC, brought this action against another founding principal to determine which of them was the proper controller of the LLC. Plaintiff argued that defendant had indicated that a version of the LLC's operating agreement, under which plaintiff would control the company, was the execution copy. The court determined that defendant, through his factual responses in the litigation, created a genuine issue of material fact as to which version of the operating agreement was the final executed version and thereby denied the summary judgment motion.

- In *Huatuco v. Satellite Healthcare*,[67] Vice Chancellor Glasscock, in a memorandum opinion, granted defendants' motion to dismiss plaintiffs' complaint, which sought a judicial dissolution of the parties' LLC. After defendants entered into a series of transactions in violation of the LLC agreement, plaintiffs sought dissolution under Delaware Code Section 18-802, which grants the Court of Chancery the authority to dissolve an LLC whenever it is "not reasonably practicable to carry on the business in conformity with a limited liability company agreement." Defendants argued that the parties' rights were limited to only those expressly granted by the LLC agreement and thus a right to seek judicial dissolution was foreclosed. The court agreed and noted that the agreement provided "that members are entitled *only* to the rights expressed in the LLC Agreement." Moreover, the agreement required a super-majority vote for a dissolution. The court explained

65. C.A. No. 8864-VCN, 2013 WL 6072249 (Del. Ch. Nov. 19, 2013).

66. C.A. No. 8919-VCN (Del. Ch. Dec 20, 2013).

67. C.A. No. 8465-VCG (Del. Ch. Dec. 9, 2013).

that Section 18-802 of the Delaware Code is a default provision applicable to Delaware LLCs where the parties' agreement is silent, and here the LLC agreement was not silent.

- In *Policeman's Annuity and Benefit Fund v. DV Realty Advisors, LLC, et al.*,[68] Vice Chancellor Noble, in a letter opinion, determined that: (i) DV Realty Advisors LLC ("DV Realty") was not a limited partner in DV Urban Realty Partners I L.P. after its removal as general partner; and (ii) calculating DV Realty's capital account based on the fair market value of the partnership was reasonable. Plaintiffs had removed DV Realty as general partner, and the court had confirmed the validity of the removal in an earlier decision. However, the court reserved jurisdiction to determine whether DV Realty's interest in the partnership converted into a limited partnership interest or a "mere economic interest" on its removal and to determine the value of DV Realty's capital account. The court found that DV Realty was not a limited partner under the Delaware Revised Uniform Limited Partnership Act, because, unless the partnership agreement provides otherwise, a person may only become a limited partner with the consent of all limited partners. The court then considered the value of DV Realty's capital account, because under the partnership agreement, the partnership was required to buy back half of DV Realty's interest upon DV Realty's removal as general partner. The court found that a calculation based on fair market value was appropriate.

- In *Zimmerman v. Crothall*,[69] Vice Chancellor Parsons, in a memorandum opinion, granted Adhezion Biomedical LLC's ("Adhezion") motion to dismiss for lack of standing, applying the "continuous ownership rule" in the LLC context. Robert Zimmerman, minority unitholder and former CEO of Adhezion, filed this derivative proceeding against the company's directors and other investors, alleging breach of fiduciary duty and breach of contract in connection with several financing transactions. In an earlier proceeding, the court granted summary judgment on the duty of care claims, but plaintiff's remaining claims continued to trial. In a post-trial opinion, the court found a breach of the LLC agreement but no breach of fiduciary duties. Plaintiff then moved for entry of a final, post-trial order, but shortly thereafter, assigned his membership interests in Adhezion to a third party. Defendants moved to dismiss, arguing that plaintiff lacked standing under the "continuous ownership rule" applicable to Delaware corporations, which requires plaintiffs suing derivatively to own the company's stock throughout the duration of the case. The court agreed, finding that there was no reason why the continuous ownership rule should not also apply in the LLC context. The court concluded that plaintiff lacked standing to pursue the action. The court also granted plaintiff's former law firm's petition for attorney's fees under the corporate benefit doctrine.

Anti-Suit Injunction

- In *Edgen Group v. Genoud*,[70] Vice Chancellor Laster, in a bench ruling, denied plaintiff Edgen Group Inc.'s ("Edgen Group") motion for an anti-suit injunction seeking to block a shareholder action filed by defendant Genoud against Edgen Group pending in a Louisiana court. Edgen Group argued that its charter, which provides that Delaware is the exclusive forum to resolve disputes concerning the company's internal affairs, precluded Genoud from bringing the action in Louisiana. While the court found that Genoud had violated the charter's forum selection clause, it nonetheless denied Edgen Group's request for an injunction, reasoning that (i) there were doubts concerning whether the court had personal jurisdiction over Genoud, who resided in Canada, and (ii) as a matter of intrastate comity, enforceability of the forum selection clause should be adjudicated by the Louisiana court.

Appeals

- In *Anderson v. Krafft-Murphy Company, Inc.*,[71] the Delaware Supreme Court reversed and remanded the Chancery Court's ruling in an action to appoint a receiver for Krafft-Murphy Company, Inc. ("Krafft") brought by tort claimants of Krafft ten years after Krafft dissolved. The Supreme Court addressed two questions of first impression: (i) whether a contingent contractual right constitutes "property" within the meaning of 8

68. C.A. No. 7204-VCN, 2013 WL 6234202 (Del. Ch. Nov. 27, 2013).
69. C.A. No. 6001-VCG, 2013 5630992 (Del. Ch. Oct. 14, 2013).
70. C.A. No. 9055-VCL (Del. Ch. Nov. 5, 2013).
71. No. 85, 2013, 2013 WL 6174485 (Del. Nov. 26, 2013).

Del. C. § 279; and (ii) whether Delaware's statutory corporate dissolution scheme contains a general applicable statute of limitations. The Court found that under *8 Del. C.* § 279, contingent contractual rights do constitute "property" of a dissolved corporation, so long as those rights are capable of vesting. Thus, Krafft held "property" – unexhausted liability insurance policies – that could justify the appointment of a receiver to defend against claims brought post-dissolution. The Court further found that Delaware's dissolution statute imposes no generally applicable statute of limitations that would time-bar claims against a dissolved corporation by third parties. Finally, the Court considered whether a dissolved corporation has the power to act absent a court-appointed receiver or trustee after *8 Del. C.* § 278's three year winding-up period expires and found that after the three year winding-up period, the dissolved corporation ceases to exist as a "body corporate" and loses the power to conduct its own affairs. However, the corporation continues for purposes of litigation commenced before the expiration of that three-year period. Thus, the Court reversed the Chancery Court's grant of summary judgment in favor of Krafft.

Appraisals

- In *Huff Fund Investment v. CKx, Inc.*,[72] Vice Chancellor Glasscock, in a memorandum opinion, found that the court's use of the merger price to determine fair value was appropriate, because: (i) the sales price was a reliable indicator of value; and (ii) neither party's expert had presented a reasonable alternative valuation method. Plaintiffs were stockholders in CKx, Inc. ("CKx") who opted for appraisal rather than the cash-out price received in the sale of CKx to an acquirer. Both parties submitted expert valuations, including a comparable companies approach and two discounted cash flow analyses that differed significantly from each other – primarily due to their use of the five-year cash flow projections prepared by company management. The court found that there were no comparable companies or transactions and that the projections used in the DCF analyses were not reliable. The court noted that the "unpredictable nature of the income stream from the company's primary asset render[ed] the apparent precision of the expert witnesses' cash flow illusory." The court concluded that, in this situation, the merger price was the most reliable indicator of CKx's value.

Attorney's Fees

- In *In re Complete Genomics, Inc.*,[73] Vice Chancellor Laster, in a bench ruling, awarded plaintiffs $315,000 in attorney's fees after plaintiffs in a shareholder class action obtained (i) a supplemental disclosure concerning the negotiation process culminating in a merger and (ii) an injunction barring Genomics, Inc. from enforcing a "don't ask/don't waive" provision. With respect to the supplemental disclosure, the court awarded plaintiffs $300,000 in attorney's fees primarily because defendants conceded that this amount was appropriate based on prior fee awards issued by the court in connection with supplemental disclosures. With respect to the preliminary injunction, the court awarded plaintiffs an additional $15,000 based on what the court determined to be an increased probability of a topping bid attributable to the injunction.

- In *Pace v. Arbitron, Inc.*,[74] Vice Chancellor Glasscock, in a bench ruling, approved a settlement agreement in connection with a shareholder class action challenging Nielsen Holdings NV's buyout of defendant Arbitron, Inc. However, the court declined to award plaintiff the full $1.1 million attorney's fees award contemplated in the settlement agreement, finding that an award of $620,000 was appropriate in light of the modest additional public disclosures required under the agreement. In reaching this conclusion, the court balanced the interests involved, noting that while stockholders and their counsel should be incentivized to bring these lawsuits, a windfall or "transaction tax" would unnecessarily drain company resources.

- In *In re Quest Software Inc. Shareholders Litigation*,[75] Vice Chancellor Glasscock, in a letter opinion, awarded plaintiffs $1 million in attorney's fees, finding that there was a causal connection between plaintiffs' action to enjoin the merger of Quest Software, Inc. into Insight Holdings Group, LLC and the Quest board's decision to

72. C.A. No. 6844-VCG, 2013 WL 5878807 (Del. Ch. Nov. 1, 2013).

73. C.A. No. 7888-VCL (Del. Ch. Oct 2, 2013).

74. C.A. No. 8243-VCG (Del. Ch. Oct. 14, 2013).

75. C.A. No. 7357-VCG, 2013 WL 5978900 (Del. Ch. Nov. 12, 2013).

abandon that transaction in favor of a merger with Dell, Inc. The court, applying the corporate benefit doctrine, also found that plaintiffs' action was meritorious when filed because the operative complaint would have survived a motion to dismiss.

Books and Records Actions

- In *King v. DAG SPE Managing Member, Inc.*,[76] Vice Chancellor Parsons, in a memorandum opinion, granted defendant's motion to dismiss a books and records action. Plaintiff, a non-stockholder and former member of defendant's board of directors, brought this action under *8 Del. C.* § 220(d) to investigate whether mismanagement or breaches of fiduciary duty occurred during his directorship. Defendant argued that plaintiff lacked standing to bring the action, because plaintiff is not a director and has not stated a proper purpose pursuant to Section 220(d). The court agreed and found that pursuant to the express language of Section 220(d), only current directors have inspection rights. In addition, the court found that plaintiff did not possess inspection rights independent of Section 220(d), such as a director's right of equal access to board information. The court noted that Delaware courts apply the equal access rule in the context of litigation involving a colorable legal claim against the company, and typically only to invalidate an assertion of attorney-client privilege over the documents at issue.

Constitutional Law

- In *Delaware Coalition for Open Government v. Strine*,[77] the United States Court of Appeals for the Third Circuit reaffirmed the Delaware district court's ruling that *10 Del. C.* § 349, which permits sitting Chancery Court judges to serve as arbitrators in confidential arbitration proceedings, violates the public's First Amendment right to access judicial proceedings. Applying the "experience and logic" test, the Court of Appeals reasoned that the "experience" prong weighs in favor of making these arbitration proceedings open to the public because they take place before active judges in a courthouse and result in binding court orders. Under the "logic" prong of the test, the Court of Appeals noted that the benefits of public access to the proceedings outweigh the parties' privacy concerns.

Contracts

- In *Cooper Tire & Rubber Co. v. Apollo (Maritius) Holdings Pvt. Ltd.*,[78] Vice Chancellor Glasscock, in a bench ruling, held that defendant did not breach its $2.5 billion merger agreement with plaintiff by failing to negotiate a new labor deal with its union. The court rejected plaintiff's allegation that defendant had intentionally delayed its talks with the union in order gain leverage to lower the deal price. According to the court, defendant "in fact used reasonable best effort to reach an agreement" with the union.

- In *eCommerce Industries, Inc. v. MWA Intelligence, Inc.*,[79] Vice Chancellor Parsons, in a post-trial memorandum opinion, found that plaintiff licensees had breached a non-complete provision of a licensing agreement with defendant licensor by promoting a competing product owned by a company affiliated with plaintiffs. The court further found that the affiliate company tortiously interfered with the licensing agreement by inducing the breach. The court ruled in favor of plaintiffs with respect to their claim that defendant breached the confidentiality provisions of the agreement by providing a copy of the agreement to the media. The court also enjoined defendant from committing future breaches of the confidentiality provision.

- In *Fletcher International, Ltd. v. Ion Geophysical Corp.*,[80] Chancellor Strine, in a memorandum opinion, awarded plaintiff Fletcher International, Ltd. ("Fletcher") $300,000 in damages after Vice Chancellor

76. C.A. No. 7770-VCP (Del. Ch. Dec. 23, 2013).

77. 733 F.3d 510 (3d. Cir. 2013).

78. C.A. No. 8980-VCG (Del. Ch. Nov. 8, 2013). Earlier this quarter, in *Cooper Tire & Rubber Co. v. Apollo (Mauritius) Holdings Pvt. Ltd, et al.*, C.A. No. 8980-VCG, 2013 WL 5787958 (Del. Ch. Oct. 25, 2013), Vice Chancellor Glasscock, in a letter opinion, denied defendant's motion for judgment on the pleadings. Defendant had argued that plaintiff failed to comply with the closing conditions in the merger agreement and was thus precluded from seeking specific performance – an argument that the court rejected from the bench. Defendant also raised for the first time during oral argument an alternative basis for judgment on the pleadings. Defendant argued that plaintiff failed to provide defendant with "reasonable access" to its books and records, and as such, defendant was not obligated to close the merger under the terms of the merger agreement. The court denied the motion, finding that the determination of reasonableness was an issue of fact for trial.

79. C.A. No. 7471 VCP, 2013 WL 5621678 (Del. Ch. Sept. 30, 2013).

80. C.A. No. 5109-CS, 2013 WL 6327997 (Del. Ch. Dec. 4, 2013).

Parsons, in a prior opinion,[81] found that defendant ION Geophysical Corp. ("ION") had caused its subsidiary to issue a $40 million note in violation of Fletcher's contractual right to consent to the issuance. Fletcher had sought damages in excess of $3.6 million, arguing that had ION sought Fletcher's consent, Fletcher would have "sought and obtained economic consideration that was substantial in comparison to the $40 million to which it had consent rights." The court, in awarding Fletcher only $300,000 in damages, found that ION could have easily structured the issuance of the note around Fletcher's consent right.

- In *Osram Sylvania v. Townsen Ventures*,[82] Vice Chancellor Parsons, in a memorandum opinion, granted in part defendants' motion to dismiss plaintiff's claims arising out of plaintiff's purchase of Encelium Holdings, Inc. ("Encelium") stock from defendants. Plaintiff alleged, among other things, that defendants had manipulated Encelium's sales figures and concealed the resignations of two of Encelium's salespeople in connection with the transaction. While the court found that plaintiff had adequately alleged fraud and breach of contract claims, the court rejected plaintiff's claims for equitable fraud and breach of the implied covenant of good faith and fair dealing. According to the court, plaintiff failed to adequately allege equitable fraud because plaintiff did not plead the existence of "special equities," such as a fiduciary relationship between plaintiff and defendants. The court held that plaintiff failed to sufficiently allege a claim for breach of the implied covenant of good faith and fair dealing because plaintiff did not "specifically identify an implied contractual obligation that it was owed" by defendants.

Corporate Governance

- In *Red Oak Fund, L.P. v. Digirad Corp.*,[83] Vice Chancellor Noble, in a post-trial memorandum opinion, found that plaintiff Red Oak Fund, L.P. ("Red Oak"), a minority stockholder in Digirad Corp. ("Digirad"), had failed to demonstrate that a stockholder vote for control of Digirad's board was improper under *8 Del. C.* § 225. According to the court, Red Oak failed to prove, among other things, that the board's alleged misstatements and omissions, including its alleged delay in disclosing unfavorable quarterly earnings and its inadvertent disclosure of informal preliminary vote tallies, were material and contributed to an unfair election. The court further held that the board had no obligation to disclose that it had, prior to the election, contemplated implementing a poison pill. According to the court, such "inner workings" are "not the proper subject of disclosure."

Demand Futility

- In *TVI Corp. v. Gallagher*,[84] Vice Chancellor Parsons, in a memorandum opinion, denied defendants' motion to dismiss plaintiffs' derivative action for failure to make a demand upon the board, finding that the complaint adequately alleged demand futility. Plaintiffs, shareholders in iCueTV, Inc. ("iCueTV") alleged that defendants, board members of iCueTV, breached their fiduciary duties by, *inter alia*, entering into wasteful employment agreements, wrongfully removing certain plaintiffs from the board, and misappropriating the company's assets. According to the court, plaintiffs' allegations that the board conspired to grant each other generous compensation agreements and surreptitiously dismissed any director that opposed these transactions were sufficient to demonstrate that any obligation to make a demand on the board was excused as futile. The court further held that while plaintiffs had adequately alleged a claim for breach of fiduciary duty, their remaining claims were deficient.

Fiduciary Duties

- In *In re BioClinica, Inc. Shareholder Litigation*,[85] Vice Chancellor Glasscock, in a memorandum opinion, granted defendants' motion to dismiss plaintiff stockholders' complaint alleging that members of the BioClinica, Inc. ("BioClinica") board breached their fiduciary duty of loyalty in connection with the acquisition of BioClinica by JLL Partners, Inc. ("JLL").

81. *Fletcher Int'l, Ltd. v. ION Geophysical Corp. (Fletcher I)*, 2010 WL 1223782 (Del. Ch. Mar. 24, 2010).
82. C.A. No. 8123-VCP, 2013 WL 6199554 (Del. Ch. Nov. 19, 2013).
83. C.A. No. 8559-VCN, 2013 WL 5740103 (Del. Ch. Oct. 23, 2013).
84. C.A. No. 7798-VCP, 2013 WL 5809271 (Del. Ch. Oct. 28, 2013).
85. C.A. No. 8272-VCG, 2013 WL 5631233 (Del. Ch. Oct. 16, 2013).

The court, in a February 5, 2013 opinion,[86] had denied plaintiffs' motion to expedite the action seeking to enjoin the acquisition of BioClinica by JLL, and the deal closed in March 2013. In the amended complaint, plaintiff stockholders claimed that BioClinicia's board breached its fiduciary duties by accepting a $7.25-per-share buyout offer from JLL that undervalued the company. Plaintiffs alleged that defendant directors procured a material benefit for themselves that was not shared with other stockholders and that the directors acted in bad faith during the sales process. The court noted that "[w]here a complaint seeking to enjoin a merger on grounds of breach of duty by the company's directors is insufficient to support a motion to expedite, the chances of the same allegations surviving a motion to dismiss are vanishingly small." The court continued: "[t]hose chances are smaller still where the motion to dismiss comes after the merger has closed, the duty of care claims have fallen away with the request for injunctive relief, only damages are sought, and the allegations are necessarily limited to duty of loyalty claims." The court found itself in that situation here and concluded that plaintiffs failed to adequately allege breach of the duty of loyalty. As such, plaintiffs' claim for aiding and abetting that breach were also dismissed.

- In *Osco Motors Co. v. Marine Acquisition Corp.*,[87] the United States District Court for the District of Delaware granted in part and denied in part defendants' motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Court addressed plaintiffs' claim that defendants breached their duty to negotiate in good faith and clarified the differences between the contractual duty of good faith and the implied covenant of good faith and fair dealing. As to the former, in Delaware, the parties' intentions control whether a letter of intent creates a contractual obligation to negotiate in good faith, and the Court found that there was an express, contractual duty to negotiate in good faith in the agreement at issue. The Court explained that in order to show a breach of the implied covenant of good faith and fair dealing, plaintiff must allege that the breaching party's actions were motivated by an improper purpose reflecting bad faith. However, plaintiff had not properly asserted a breach of the implied duty of good faith and this claim was dismissed. The Court denied defendants' motion to dismiss as to plaintiff's breach of contract claim, rejecting the argument that defendants did not breach the confidentiality agreement by using but not disclosing confidential information. The Court found that confidentiality agreements are intended and structured to prohibit both.

- In *Pfeiffer v. Leedle*,[88] Vice Chancellor Parsons, in a memorandum opinion, denied a motion to dismiss a derivative action brought by plaintiff stockholder of Healthways, Inc. against the company's president, Ben Leedle, Jr., and its directors for approving stock option grants to Leedle in excess of the amount permitted by the stockholder-approved stock incentive plan. Plaintiff alleged that the directors breached their duties of loyalty and care by granting the impermissible stock options and by causing the company to issue a false and misleading proxy statement. Plaintiff further alleged that by accepting the grants, Leedle breached his fiduciary duties and was unjustly enriched. The court denied the motion to dismiss, finding that there was a *prima facie* showing of a violation of the stock option plan and that the board either knowingly or deliberately violated the plan in granting the options at issue. The court applied the two part *Aronson* test and found that plaintiff had met the high threshold to rebut the business judgment rule presumption. Plaintiff alleged sufficient facts to show that the board violated the unambiguous provisions of the stock incentive plan, and therefore pre-suit demand was excused under Court of Chancery Rule 23.1. Plaintiff's allegations also survived the less stringent standard under Rule 12(b)(6).

Injunctions

- In *DGWL Investment Corp. v. Giannini*,[89] Vice Chancellor Parsons, in a bench ruling, granted plaintiffs DGWL Investment Corp. and Arthur Dogswell, LLC's (jointly, "Dogswell") motion for a preliminary injunction against defendant Gianmarco Giannini, the

86. C.A. No. 8272-VCG, 2013 WL 673736 (Del. Ch. Feb. 25, 2013) (finding that the combination of deal-protection devices at play, including a poison pill and a non-disclosure agreement containing a standstill provision, did not impermissibly render the deal a "lock-up, preclusive to other bidders.").

87. C.A. No. 13-868-RGA-MPT, 2013 WL 6228496 (D. Del. Dec. 2, 2013).

88. C.A. No. 7831-VCP 2013 WL 5988416 (Del. Ch. Nov. 8, 2013).

89. C.A. No. 8647-VCP (Del. Ch. Oct. 10, 2013).

founder and CEO of Arthur Dogswell, LLC. The court found that Dogswell had demonstrated a likelihood of success on the merits with respect to its claim that Giannini had violated a non-compete agreement set forth in an investment contract among the parties. The court rejected Giannini's argument that the non-compete agreement was unenforceable, finding that it was the result of "arms-length bargaining with the assistance of competent counsel and financial advisors." The court also found that Dogswell had demonstrated a significant risk of irreparable harm should the preliminary injunction not issue in light of Giannini's extensive knowledge of confidential company information.

- In *North River Insurance Company v. Mine Safety Appliances Co.*,[90] Vice Chancellor Glasscock, in a memorandum opinion, denied plaintiff insurer's request for an anti-suit injunction that would prevent defendant insured from participating in a number of actions, including personal injury actions brought by non-party tort plaintiffs for which the insured was seeking coverage under the insurer's policies. The court first noted that it had the power to enjoin parties from litigating in other jurisdictions but emphasized that such anti-suit injunctions should be entered sparingly and only where: (i) irreparable harm is threatened; (ii) equity supports the injunctive relief; (iii) the relief sought will be effective; and (iv) comity has been fully exercised. Plaintiff argued that it would be irreparably harmed from inconsistent judgments. However, the court found that it could not protect against inconsistent judgments, because it lacked jurisdiction over tort plaintiffs who could continue to litigate against defendant insured. In addition, it would be inequitable to grant an anti-suit injunction – thereby allowing the insurer to continue to litigate issues defining the insured's rights while preventing the insured from defending itself in related actions.

Jurisdiction

- In *Czarninski Baier de Adler v. Upper New York Investment Co., LLC*,[91] Vice Chancellor Noble, in a memorandum opinion, granted in part defendants' motion to dismiss an action arising out of a dispute among family members of Ecuadorian citizenship over their interests in a group of family-owned companies based in Ecuador. Plaintiff alleged, among other things, that the individual defendants engaged in a scheme to dilute her ownership interest in certain of the family-owned companies and then transfer the companies' stock to Delaware-based limited liability companies for inadequate consideration. Defendants sought dismissal on two grounds: (i) the court lacked subject matter jurisdiction over the action because plaintiff's claims were governed by Ecuadorian law; and (ii) plaintiff's claims were, in any event, defectively pled. The court held that it had subject matter jurisdiction over plaintiff's claims for breach of fiduciary duty and unjust enrichment arising under Ecuadorian law because they were equitable in nature. However, the court dismissed plaintiff's unjust enrichment claim because plaintiff "had another cause of action available to her."

- In *Darby Emerging Markets Fund v. Ryan*,[92] Vice Chancellor Parsons, in a memorandum opinion, denied defendants' motion to dismiss an action alleging that defendants, the majority stockholders of Atlantica Hotels International, Ltd. ("AHI"), breached a shareholders' agreement and AHI's articles of association, thereby injuring plaintiff, a minority stockholder of AHI. Defendants argued that the court lacked subject matter jurisdiction to adjudicate the dispute and that plaintiff failed to state a claim upon which relief could be granted. The court disagreed, holding that it had subject matter jurisdiction under the "clean up doctrine," which permits a court to exercise equitable jurisdiction over the entire case even if certain of the claims are not equitable in nature. The court further held that plaintiff had sufficiently alleged a claim for anticipatory breach.

- In *Lake Treasure Holdings, Ltd. v. Foundry Hill GP LLC*,[93] Vice Chancellor Laster, in a letter opinion, denied motions to dismiss filed by certain of the defendants in an action alleging that defendants conspired to misappropriate the intellectual property of Foundry Hill Holdings LP ("Foundry"). Defendants argued that the court lacked personal jurisdiction because they were nonresidents of Delaware. The court disagreed

90. C.A. No. 8456-VCG (Del. Ch. Dec. 20, 2013).
91. C.A. No. 6896-VCN, 2013 WL 5874645 (Del. Ch. Oct. 31, 2013).
92. C.A. No. 8381-VCP, 2013 WL 6401131 (Del. Ch. Nov. 27, 2013).
93. C.A. No. 6546-VCL, 2013 WL 6184066 (Del. Ch. Nov. 21, 2013).

with respect to all but one of the defendants seeking dismissal, holding that plaintiffs adequately alleged that their claims against these defendants arose out of two distinct business transactions occurring in Delaware. The court granted defendant Zero Capital Partners, LLC's ("Zero Capital") motion to dismiss, finding that plaintiffs alleged only that Zero Capital "provided office space and IT support" to the other defendants in exchange for its use of Foundry's intellectual property. The court noted that plaintiffs failed to allege that Zero Capital knew that its use of the intellectual property was unlawful.

- In *Microsoft Corporation v. Amphus, Inc., et al.*,[94] Vice Chancellor Parsons, in a memorandum opinion, denied in part and granted in part defendants' motion to dismiss plaintiffs' derivative complaint. The action arose from the restructuring of a British Virgin Islands company, and the derivative plaintiff alleged that one of the company's directors breached his fiduciary duties by using the restructuring to fraudulently obtain a larger stake in the company's intellectual property and that various entities and an individual aided and abetted these breaches of fiduciary duties. Defendants moved to dismiss for lack of personal jurisdiction over several defendants and under the doctrine of laches. The court determined that it did not have personal jurisdiction with respect to two of the defendants – one who lacked capacity to be sued and the other over whom the court lacked personal jurisdiction. The court found that defendant Amphus, Inc. ("Amphus"), a dissolved corporation, lacked the capacity to be sued as the three-year statutory period to bring suit against Amphus under *8 Del. C.* § 278 had expired. Although the court had discretion under Section 278 to extend the existence of a dissolved corporation, it chose not to do so. In addition, the court found that defendant Michio Fujimura was not subject to personal jurisdiction under *10 Del. C.* § 3114 or under *10 Del. C.* § 3104(c)(1) and thus dismissed the derivative claims against Fujimura.

- In *Northside Community Bank v. Friedman, et al.*,[95] Vice Chancellor Glasscock, in a memorandum opinion, granted in part and denied in part defendants' motion to dismiss plaintiff's complaint for lack of personal jurisdiction. The action was brought by plaintiff bank against two individual defendants who were guarantors of a loan by plaintiff bank and who, in anticipation of a default on the loan, allegedly created Delaware entities as part of a scheme to fraudulently transfer their assets beyond the reach of the bank with the help of a third individual defendant. The court held that it had personal jurisdiction over the two individual defendants who were guarantors of the loan pursuant to Delaware's long-arm statute, *10 Del. C.* § 3104, because they transacted business in Delaware by creating the Delaware entities and by transferring assets to those entities. In addition, the court found that it had personal jurisdiction over the third individual defendant under both the Delaware long-arm statute and the conspiracy theory of jurisdiction. The court found sufficient facts to support an inference that the elements of conspiracy were satisfied, that the third individual defendant had reason to know that the entities were incorporated in Delaware, that the acts of incorporation were foreseeable acts in furtherance of the conspiracy and that a substantial act in furtherance of the conspiracy occurred in Delaware. Finally, the court found that it had personal jurisdiction over the Illinois pass through entities also under the conspiracy theory of jurisdiction.

Laches

- In *Klaassen v. Allegro*,[96] Vice Chancellor Laster, in a post-trial memorandum opinion, found that Klaassen's action for declaratory relief under *8 Del. C.* § 225 was barred by the doctrines of laches and acquiescence. Klaassen had sought a declaration providing, among other things, that he remained the CEO of Allegro Development Corp. and that the board's vote to replace him was invalid. According to the court, the laches doctrine precluded Klaassen from challenging his removal as CEO because he had been aware of, but failed to assert, his claims for over seven months. The court also held that the acquiescence doctrine barred Klaassen's claims because, based on Klaassen's conduct, it was reasonable for the board to believe that Klaassen had consented to the installation of the new CEO.

94. C.A. No. 8092-VCP, 2013 WL 5899003 (Del. Ch. Oct. 31, 2013).
95. C.A. No. 8405-VCG, 2013 WL 6091701 (Del. Ch. Nov. 20, 2013).
96. C.A. No. 8626-VCL, 2013 Wl 5967028 (Del. Ch. Nov. 7, 2013).

- In *In re Primedia Inc. Shareholders Litigation*,[97] Vice Chancellor Laster, in a memorandum opinion, denied in part and granted in part defendants' motion for judgment on the pleadings based on defendants' argument that plaintiffs' claims were barred by laches. Plaintiff stockholders of Primedia, Inc. ("Primedia") alleged a "*Parnes* claim," under which a former stockholder of an acquired company whose standing to sue derivatively was extinguished by a merger is nonetheless permitted to pursue a post-merger fiduciary duty claim directly challenging the merger on the grounds that the target board agreed to a deal price that failed to account for the value of an underlying derivative claim held by the target company. Plaintiffs underlying claim was a "*Brophy* claim" for insider trading against Primedia's controlling shareholder, Kohlberg Kravis Roberts & Co. L.P. ("KKR"). The court explained the doctrine of equitable tolling and how it applies to *Brophy* claims. With respect to KKR's purchase of preferred stock made before the public announcement of the merger, the court found that plaintiffs' claim was not equitably tolled, because there were red flags and plaintiffs could have discovered the key facts to support the claim by inspecting the company's books and records. However, the court found that laches did not bar the plaintiffs' claim with respect to KKR's purchases of preferred stock made in July 2002, because, in that case, the necessary information to adequately allege plaintiffs' derivative claim would not have been uncovered through a Section 220 books and record demand.

Motions to Dismiss

- In *In re Ancestry.com, Inc. Shareholder Litigation*,[98] Chancellor Strine, in a bench ruling, granted defendants' motion to dismiss plaintiffs' amended complaint involving allegations that the buyout of Ancestry.com by private equity firm Permira Advisers, LLC ("Permira"), was accomplished at an unfair price. Plaintiffs alleged that Ancestry.com's directors had turned down a more lucrative offer from another private equity firm based on a side deal allowing management to remain on-board after the buyout. The court noted the applicable standard from *In re General Motors Shareholder Litigation*,[99] which held that the court is not required to accept as true conclusory allegations without sufficient support. The court found that the plaintiffs had not sufficiently pled facts to sustain: (i) a claim against a 31% stockholder as a controlling stockholder, noting the distinction between an influential stockholder and a controlling stockholder; (ii) a claim that certain directors had sufficient conflicts of interest to breach their duty of loyalty; and (iii) that the successful bidder aided and abetted any breach of fiduciary duty by the directors, because no such breach of duties was found. The merger agreement was approved on December 27, 2012 by stockholders owning approximately 75% of Ancestry.com common stock.

- In *ENI Holdings, LLC, v KBR Group Holdings, LLC*,[100] Vice Chancellor Glasscock, in a memorandum opinion, granted in part plaintiff ENI Holdings, LLC's ("ENI") motion to dismiss defendant KBR Group Holdings, LLC's ("KBR") counterclaims. The court held that KBR had failed to sufficiently allege, or was, pursuant to a stock purchase agreement, time-barred from recovering on, several of its breach of contract claims against ENI in connection with KBR's $280 million purchase of Roberts & Schaefer Co. from ENI. However, the court also held that KBR had adequately alleged, *inter alia*, certain of its fraud claims based on alleged misrepresentations deemed "non-fundamental" to the stock purchase agreement. According to the court, because it was unclear whether these claims were time-barred by the stock purchase agreement, the court was required to resolve the ambiguity in favor of KBR at the motion to dismiss phase.

- In *Simplexity, LLC v. Zeinfeld*,[101] Vice Chancellor Glasscock, in a letter opinion, granted in part defendants Zeinfeld and Brightstar Corp.'s ("Brightstar") motion to dismiss. The court held, *inter alia*, that plaintiff Simplexity, LLC ("Simplexity") had adequately alleged that defendant Zeinfeld, who was Simplexity's former CEO, had breached his employment agreement with Simplexity and that Brightstar had tortiously interfered

97. C.A. No. 6511-VCL (Del. Ch. Dec. 20, 2013).
98. C.A. No. 7988-CS (Del. Ch. Sept. 27, 2013, filed Oct 1, 2013).
99. 897 A.2d 162 (Del. 2006).
100. C.A. No. 8075-VCG, 2013 WL 6186326 (Del. Ch. Nov. 27, 2013).
101. C.A. No. 8171-VCG, 2013 Wl 5702374 (Del. Ch. Oct 17, 2013).

with this agreement. However, the court found that Simplexity failed to adequately allege either that Zeinfeld had tortiously interfered with a memorandum of understanding between Simplexity and Brightstar or that Brightstar had breached the memorandum of understanding, finding those claims mooted because the memorandum of understanding had been superseded by a master services agreement.

- In *Spring Real Estate, LLC v. Echo/RT Holdings, LLC*,[102] Vice Chancellor Noble, in a letter opinion, granted defendants' motion to dismiss an action brought to recover on a default judgment entered against a dissolved corporation from its successor entity. Plaintiff alleged multiple theories of liability, including not only that the successor entity bore successor liability for the default judgment, but that it was otherwise liable for that judgment because the purchase agreement was a fraudulent transfer. In granting the motion, the court found that (i) the asset purchase agreement was not a merger (and the default judgment at issue therefore was not expressly assumed by the defendant) and, thus, no basis existed for successor liability claim under either a *de facto* merger or the continuation theory and (ii) the transfer was neither actually nor constructively fraudulent under Delaware or Illinois law because the allegations of intent were conclusory and the transferor received reasonably equivalent value in the sale.

Motions to Reconsider

- In *Costantini v. Swiss Farm Stores Acquisition LLC*,[103] Vice Chancellor Glassock, in a letter opinion, granted in part James Kahn's ("Kahn") motion for re-argument in connection with the court's earlier determination that Kahn was not an agent of Swiss Farm Stores Acquisition LLC ("Swiss Farm") and therefore was not entitled to indemnification. Kahn had sought indemnification from Swiss Farm for fees and costs incurred in defending a breach of fiduciary duty claim brought by Swiss Farm, which was dismissed based on the doctrine of laches. The court had previously found that Kahn was not a manager, officer, employee or agent of Swiss Farm – the categories of persons entitled to indemnification under Swiss Farm's operation agreement. Kahn submitted evidence of the agency relationship with his motion for reargument, specifically an exclusive brokerage agreement and developer agreement between Swiss Farm and Kahn's management company. The court found that those agreements showed that Kahn and Swiss Farm may have had an agency relationship, but determined that the record required further development. As such, Kahn's motion for re-argument was granted in part, but Kahn was not entitled to a judgment on the pleadings.

- In *Preferred Investments, Inc. v. T&H Bail Bonds, et al.*,[104] Vice Chancellor Parsons, in a letter opinion, denied plaintiff Preferred Investment Services, Inc.'s ("PISI") motion for re-argument or clarification and denied defendant T&H Bail Bonds, Inc.'s ("T&H") request for attorney's fees incurred in responding to the motion. PISI filed its motion for re-argument or clarification under Court of Chancery Rules 59(e) and 59(f) after the court, in a post-trial memorandum opinion, found in favor of defendant on PISI's breach of contract claim and on T&H's breach of contract counterclaim. The court found plaintiff's invocation of Rule 59(e) misplaced, because plaintiff had not pointed to either an intervening change in controlling law or the availability of new evidence, nor had plaintiff identified any need to correct a clear error of law or to prevent manifest injustice. The court denied plaintiff's Rule 59(f) motion, finding that plaintiff did not demonstrate that the court misapprehended any facts or law or that reconsideration of the issues raised in plaintiff's motion would lead to a different result. The court noted that plaintiff merely raised arguments already presented to and rejected by the court or arguments otherwise not reflective of outcome determinative issues.

Motions to Stay

- In *PECO Holdings Corp. v. Weil, et al.*,[105] Vice Chancellor Noble, in a letter-opinion, granted defendants' motion to stay the action pending in

102. C.A. No 7994-VCN (Del. Ch. Dec. 31, 2013).
103. C.A. No. 8613-VCG, 2013 WL 6327510 (Del. Ch. Dec. 5, 2013).
104. C.A. No. 5886-VCP, 2013 WL 6123176 (Del. Ch. Nov. 21, 2013).
105. C.A. No. 8448-VCN, 2013 WL 5861982 (Del. Ch. Oct. 31, 2013).

Delaware Chancery Court in favor of a similar claim filed in Ohio. This action arose from challenges to a short-form merger of Process Equipment Company of Tipp City ("Process Equipment") by plaintiff PECO Holdings Corp. ("PECO") brought by ousted CEO of Process Equipment and board member of PECO, Robert Weil. Weil initially brought an action in New York against PECO to challenge his termination and subsequently brought an action in Ohio for breach of fiduciary duty and breach of contract. Two years later, PECO brought the instant action in Delaware seeking declaratory judgment that Weil's only remedy is an appraisal action under *8 Del. C.* § 262. The court granted defendants' motion stay, finding that the *McWane*[106] doctrine was satisfied as this matter involved a "prior action pending elsewhere, in a court capable of doing prompt and complete justice, involving the same parties and the same issues."

Practice and Procedure

Evidentiary Matters

- In *In re Rural Metro Corporation Shareholders Litigation*,[107] Vice Chancellor Laster, in a memorandum opinion, granted plaintiffs' motion to exclude post-trial evidence and declined to take judicial notice of the evidence defendants sought to introduce. Plaintiffs, stockholders of Rural/Metro Corporation ("Rural"), brought this class action challenging the sale of Rural to a private equity firm. Post-trial, defendants sought to introduce a declaration of Stephen Farber, who had become Rural's CFO two years after the closing of the challenged transaction. The declaration had been filed in bankruptcy court and included Farber's opinions on Rural's financial performance and solvency. The court conducted a *Pope*[108] analysis and determined that a re-opening of the record was not appropriate, because, among other reasons, defendants could have discovered the evidence for use at trial, the declaration was not material and relevant in that it would not likely change the outcome of the case and the introduction of the new evidence would unduly prejudice plaintiffs.

Privilege

- In *Great Hill Equity Partners v. SIG Growth Equity Fund I, LLP*,[109] Chancellor Strine, in a memorandum opinion, held that defendant sellers in a merger transaction had waived the attorney-client privilege with respect to certain attorney-client communications contained in the acquired company's computer files that had been transferred to plaintiff buyers as a result of the merger. The court reasoned that *8 Del. C.* § 259, which provides that following a merger, "all property rights, privileges, powers, and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation," includes the attorney-client privilege. The court noted that the parties could have provided for a different result in the merger agreement.

Settlements

- In *United Health Alliance, LLC v. United Medical, LLC*,[110] Vice Chancellor Parsons, in a memorandum opinion, denied defendant's motion to enforce an oral settlement agreement, finding that no enforceable agreement had actually been reached. The parties had submitted their contract dispute to voluntary mediation and during that mediation, appeared to have reached an oral settlement agreement. However, after the mediation, a dispute arose as to the breadth of the release to which that parties had orally agreed. The court noted that in Delaware, the formation of a contract requires a complete meeting of the minds among the parties to the agreement. Because the parties in the instant action had very different interpretations of the scope of the release, the court found that there was no actual meeting of the minds and found that the settlement agreement was unenforceable.

- In *Wang v. Fulton, et al.*,[111] Vice Chancellor Laster refused to approve a portion of a settlement agreement that stated that adequate notice had been given to

106. *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970).
107. C.A. No. 6350-VCL (Del. Ch. Dec. 17, 2013).
108. *Pope Invs. LLC v. Benda Pharm, Inc.*, 2010 WL 3075296 (Del. Ch. Jul. 26, 2010).
109. C.A. No. 7906-CS, 2013 WL 6037329 (Del. Ch. Nov. 15, 2013).
110. C.A. No. 7710-VCP, 2013 WL 6383026 (Del. Ch. Nov. 27, 2013).
111. C.A. No. 3409-VCL (Del. Ch. Oct. 29, 2013).

the class. According to the court, the notice of the settlement was deficient because it did not explain what value plaintiffs' placed on the settlement. Thus, the court lacked sufficient information to determine the reasonableness of the settlement. The court treated the offending sentence as omitted, and ordered the parties to fix this error when mailing notice to the class.

Written Consents

- In *Boris v. Schaheen, et al.*,[112] Vice Chancellor Noble, in a post-trial memorandum opinion, determined the validity of two written consents that removed directors from and elected new directors to the boards of two corporations, Numoda Technologies, Inc. ("Numoda Tech") and Numoda Corporation ("Numoda Corp."). The validity of the consents depended on whether the corporations' past directors validly issued stock under the DGCL. Plaintiffs had acted by written consent under *8 Del C*. § 228 as purported majority stockholders of the corporations to elect themselves to the boards of both companies. The court first addressed whether plaintiffs were the majority stockholders of the corporations – both of which operated with informal corporate governance systems. The court found that Section 151(a) of the DGCL required a written instrument evidencing board approval of the issuance of stock and without that written instrument, the issuance is void. The court also concluded that it lacked equitable power to remedy void stock. The court found that plaintiffs were the majority stockholders of Numoda Corp, and thus the written consent removing defendant Mary Schaheen from and electing plaintiffs to the Numoda Corp. board was valid. The court found that Numoda Tech had no validly issued stock, and thus, the written consent removing defendant Schaheen from and electing plaintiffs to the Numoda Tech board was invalid.

- In *Flaa v. Montano*,[113] Vice Chancellor Glasscock, in a memorandum opinion, granted defendants' motion for summary judgment, finding that stockholder consents, which purportedly displaced defendants as directors of CardioVascular BioTherapeutics, Inc. ("Cardio"), were invalid. Plaintiff filed the action to confirm the removal of certain members of the Cardio board through action taken by written stockholder consents. In connection with defendants' challenge of the consents, plaintiff argued that the same standard should apply as to a challenge of a proxy and that the court should exclude extrinsic evidence in determining the validity of the consents. The court disagreed, noting that once a challenge is made to the executor's authority, the court will look beyond the face of the consent to determine its validity. The court concluded that the executor lacked both actual and apparent authority to vote the written consents, and plaintiff was unable to prove that Cardio relied on the consent card's representation of the executor's authority. Because the court found that the consents were invalidly executed and that defendants were not judicially estopped from challenging the authority to vote the consents, defendants' motion for summary judgment was granted.

- In *Ravenswood Investment Co., L.P. v. Winmill*,[114] Vice Chancellor Noble, in a letter opinion, denied plaintiff Ravenswood Investment Company, L.P.'s ("Ravenswood") motion for partial summary judgment on its claim that defendant Winmill & Co. Inc. had improperly issued options as part of its incentive stock option plan. Specifically, Ravenswood argued that the stockholder consent approving the stock option plan failed to satisfy 8 *Del. C.* § 228(c), which requires that every consent "shall bear the date of signature of each stockholder or member who signs the consent . . . ." According to Ravenswood, the consent, dated "as of May 25, 2005," was improper because it was actually signed *on* May 25, 2005. The court rejected Ravenswood's argument, finding that "as of" can mean the date of execution.

112. C.A. No. 8160-VCN, 2013 WL 6331287 (Del. Ch. Dec. 2, 2013).
113. C.A. No. 8632-VCG, 2013 WL 5498045 (Del. Ch. Oct. 4, 2013).
114. C.A. No. 3730-VCN, 2013 WL 6228805 (Del. Ch. Nov. 27, 2013).

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